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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 FAY AVENUE PROPERTIES, LLC,) Civil No. 11-2389-GPC(WVG)
12 LA JOLLA SPA MD, INC.,)
13 Plaintiffs,) ORDER AFTER ORDER TO SHOW
14 v.) CAUSE HEARING RECOMMENDING
15 TRAVELERS PROPERTY CASUALTY) TERMINATING SANCTIONS AGAINST
16 COMPANY OF AMERICA,) PLAINTIFF LA JOLLA SPA MD,
17 Defendant.) INC.
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On January 17, 2013, the Court held an Order To Show Cause ("OSC") Hearing regarding why it should not recommend that terminating sanctions be imposed on Plaintiff La Jolla Spa MD, Inc. ("LJ Spa"). Leon Campbell ("Campbell") appeared on behalf of Plaintiff LJ Spa. Aaron Agness appeared on behalf of Travelers Property Casualty Company of America ("Travelers"). Edward J. McIntyre and Meredith King were sworn and testified at the OSC hearing.

The Court, having reviewed the history of this case, the documents filed by counsel and by Mr. McIntyre, the testimony of Mr.

1 McIntyre and Ms. King and GOOD CAUSE APPEARING, HEREBY RECOMMENDS
2 THAT TERMINATING SANCTIONS BE IMPOSED AGAINST Plaintiff LJ Spa.

3 I

4 FACTUAL BACKGROUND

5 On August 26, 2011, Plaintiffs filed this action against
6 Travelers alleging that Travelers committed breach of contract, bad
7 faith, fraud, and negligence.

8 On October 13, 2011, Travelers removed this action to this
9 Court.

10 On November 3, 2011, Travelers filed a Motion To Dismiss
11 Plaintiffs' Complaint.

12 On January 10, 2012, LJ Spa's first attorney filed a Motion
13 To Withdraw as attorney of record citing a breakdown in the
14 attorney-client relationship and irreconcilable differences. On
15 January 19, 2012, the Motion To Withdraw was granted.

16 On January 20, 2012, Plaintiff's current counsel, Campbell,
17 filed a Declaration on his own behalf ("Campbell Declaration"), in
18 which he represented to the Court that he was retained by Diane York
19 ("York"), LJ Spa's principal, to assist in finding substitute
20 counsel for Plaintiffs. Campbell stated: "I do not regard myself as
21 sufficiently experienced in insurance bad faith actions to substi-
22 tute myself as counsel," and "(I)t is the intention of the Plaintiff
23 to continue with diligence to retain new counsel." (Campbell
24 Declaration at 1, para. 2, 2, para. 4).

25 On January 26, 2012, the District Judge assigned to this case
26 recognized that the Campbell Declaration had been filed, but noted
27 that the Motion To Withdraw had already been granted, and rejected
28 the Campbell Declaration as moot.

1 On February 3, 2012, Campbell filed an "Appearance of
2 Counsel" on behalf of LJ Spa.

3 On February 28, 2012, the District Judge assigned to this
4 case granted Travelers' Motion To Dismiss with leave to amend. The
5 Order Granting The Motion To Dismiss noted that the Motion was
6 granted for Plaintiffs' failure to file opposition papers, pursuant
7 to S.D. Cal. Local Rule 7.1(f)(3)(c). The Order also noted that the
8 hearing on the Motion was extended for five weeks to accommodate
9 Plaintiffs' search for new counsel, but no new counsel entered an
10 appearance on behalf of Plaintiffs.

11 On March 26, 2012, Travelers filed an Answer to Plaintiffs'
12 Complaint.

13 On May 21, 2012, the Court conducted an Early Neutral
14 Evaluation Conference ("ENE"). The case did not settle at the ENE.
15 Therefore, the Court ordered, *inter alia*, pursuant to Fed. R. Civ.
16 P. 26, that a Joint Discovery Plan be submitted to the Court by June
17 21, 2012, that Initial Disclosures shall be completed by June 25,
18 2012, and that a Case Management Conference ("CMC") shall be held on
19 June 29, 2012.

20 On June 29, 2012, the Court conducted a CMC. Campbell did not
21 appear at the CMC on behalf of LJ Spa. However, LJ Spa construc-
22 tively participated in formulating the Joint Discovery Plan, but the
23 Joint Discovery Plan was not signed by Campbell. Instead, the Joint
24 Discovery Plan was signed by attorney Andrew P.P. Dunk ("Dunk") as
25 "Attorneys for Plaintiff La Jolla Spa MD, Inc." Although Dunk signed
26 as the attorney for LJ Spa, he did not (and has not) entered an
27 appearance in this action. Since neither Campbell nor Dunk appeared
28 at the CMC, the Court set an OSC hearing for July 31, 2012.

1 On July 12, 2012, Travelers propounded Interrogatories and
2 Requests for Production of Documents on LJ Spa.

3 On July 17, 2012, Dunk filed a "Declaration of Counsel,"
4 ("Dunk Declaration") that explained that at the time he signed the
5 Joint Discovery Plan, he "was in negotiations to become counsel of
6 record for... Plaintiffs in this matter," but that he had "not yet
7 been formally retained." (Dunk Declaration at paras. 3, 4).

8 On July 24, 2012, Travelers filed a Response to the OSC. In
9 the Response, Travelers informed the Court that Plaintiffs' Initial
10 Disclosures had not been served and noted Plaintiffs' violations of
11 three Court orders: (1) failure to appear at the CMC, (2) failure to
12 serve Initial Disclosures, and (3) failure to respond to the OSC.

13 On July 31, 2012, the Court held an OSC hearing for Plain-
14 tiff's counsel's failure to appear at the CMC. At the OSC hearing,
15 the Court ordered LJ Spa to serve its Initial Disclosures by August
16 3, 2012 and to serve responses to Travelers' interrogatories and
17 Requests for Production of Documents by August 15, 2012.

18 On August 13, 2012, LJ Spa served on Travelers its responses
19 to Travelers' discovery requests. However, the responses were
20 simple, improper, boilerplate objections citing irrelevance of the
21 requested information, and redundancy in that the information
22 requested had been previously provided. Despite these responses, LJ
23 Spa had not produced any documents in this litigation.^{1/} Further, the
24 discovery requests to which LJ Spa responded that the information
25 sought was irrelevant, was clearly relevant to LJ Spa's claims in
26 this action.

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28 ^{1/}It appeared to the Court that prior to filing this action, LJ Spa had
provided some documents to Travelers, but the documents were not identified.

1 For example, Travelers' Interrogatory No. 1 asks LJ Spa to
2 state the name and location(s) of all damages to the subject
3 property that LJ Spa contends was destroyed by Mitchel Goldman as
4 alleged in Paragraph 10 of the Complaint. LJ Spa's response was:
5 "Object. Irrelevant." (Declaration of Aaron Agness in Support of
6 Defendant Travelers Motion To Compel Regarding La Jolla Spa MD,
7 Inc.'s Responses to Discovery Requests, "Agness Dec.," Exhibit 4 at
8 36-37). Travelers' Interrogatory No. 2 asks LJ Spa to state the
9 dollar amount of the damage it contends was caused by Mitchel
10 Goldman. LJ Spa's Response was "Object. Irrelevant." (Agness Dec.,
11 Exh. 4 at 37). Travelers' Request for Production of Documents No. 3
12 asks LJ Spa to produce all documents that relate to, or evidence the
13 dollar amount of the physical damage to the subject property as a
14 result of the incident. LJ Spa's response was "Object as Irrele-
15 vant." Travelers' Request for Production of Documents No. 6 asks LJ
16 Spa to produce all documents that refer to, relate to or evidence
17 the amount of damage LJ Spa sustained as a result of the incident.
18 LJ Spa's Response was : "Object, redundant, already provided."
19 (Agness Dec., Exh. 2 at 18).

20 On August 21, 2012, the Court held a Status Conference in
21 this action. At the Status Conference, the Court ordered counsel, by
22 August 31, 2012, to meet and confer regarding LJ Spa's responses to
23 Travelers' discovery requests. Also, the Court ordered LJ Spa to
24 provide to Travelers specificity as to where allegedly previously
25 produced documents that were responsive to Travelers' discovery
26 requests could be located.

27 On August 23, 2012, LJ Spa's and Travelers' counsel met and
28 conferred by telephone regarding LJ Spa's discovery responses.

1 Campbell ended the telephone conference before the meet and confer
2 efforts were completed. Campbell told Travelers' counsel that he
3 would get back to Travelers' counsel. However, Campbell did not
4 reinitiate contact with Travelers' counsel nor did he supplement LJ
5 Spa's discovery responses.

6 On September 13, 2012, Travelers' counsel wrote to Campbell
7 regarding LJ Spa's outstanding discovery responses. Campbell did not
8 respond to this communication, nor did he provide supplemental
9 responses to Travelers' discovery requests.

10 On November 8, 2012, Travelers filed a Motion to Compel
11 Regarding Plaintiff's Discovery Requests, Request for Terminating
12 Sanctions or Money Sanctions.

13 On December 6, 2012, the Court held a hearing on Traveler's
14 Motion to Compel Regarding Plaintiff's Discovery Requests, Request
15 for Terminating Sanctions or Money Sanctions. At the hearing,
16 Campbell informed the Court that he and York needed access to LJ
17 Spa's documents in LJ Spa's offices in order to respond to Trav-
18 eler's discovery requests. On that same date, the Court issued an
19 Order stating that LJ Spa was to contact the Trustee of the Fay
20 Avenue bankruptcy estate, or whomever had the authority to allow LJ
21 Spa access to LJ Spa's offices (see below) for the purposes of
22 responding to Traveler's discovery requests. Also, the Court's Order
23 stated that on or before December 14, 2012, LJ Spa shall serve on
24 Travelers complete, substantial and meaningful responses, without
25 objections, to Traveler's interrogatories, and to produce to
26 Travelers the documents it had requested. Further, the Court's Order
27 stated that LJ Spa was to pay Travelers, by January 4, 2013, the sum
28 of \$3,565.00 in sanctions for Travelers' fees and expenses in making

1 the Motion to Compel.^{2/} Additionally, in the Order, the Court warned
2 LJ Spa that its failure to abide by court orders, the Court's Local
3 Rules, and its discovery obligations in this case, may subject it to
4 dismissal of its case. (Order Granting In Part and Denying In Part
5 Defendant's Motion to Compel Regarding Plaintiff LJ Spa's Response
6 To Discovery Requests, And For Sanctions or Money Sanctions,
7 December 6, 2012).

8 On December 11, 2012, Edward J. McIntyre, filed a Declaration
9 on his own behalf In Relation To Pending Discovery Issues Between
10 Travelers Property Casualty Company of America and La Jolla Spa MD,
11 Inc. The Declaration states in pertinent part:

12 1. Mr. McIntyre represents BioFilm, Inc. ("BioFilm").

13 2. Fay Avenue (Plaintiff in this action) is a debtor in a
14 Chapter 7 bankruptcy proceeding. Fay Avenue and other Diane York-
15 related companies, are also parties to several actions in San Diego
16 Superior Court involving BioFilm.

17 3. BioFilm was permitted by the Bankruptcy Court to fore-
18 close, and did foreclose, on 7630 Fay Avenue, La Jolla, California
19 ("the building"). On October 19, 2012, the San Diego County Sheriff
20 evicted York and all of her companies from the building.

21 4. Until October 19, 2012, York and Campbell had unfettered
22 access to any document or other business records that were in the
23 building.

24 5. On October 31, 2012, York sought access to the building
25 from the San Diego Superior Court. York's request was supported by
26 her own Declaration that stated that some of her personal property

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28 ^{2/}Neither LJ Spa nor Travelers has informed the Court whether the ordered
sanctions were paid.

1 was in the building. The Declaration did not state that she needed
2 access to the documents in the building to fulfill her discovery
3 obligations in this case, or to comply with the Court's orders.

4 6. On November 7, 2012, Judge Pressman of the San Diego
5 Superior Court entered a restraining order in BioFilm v. DYG Spa, et
6 al., that disallowed York from entering the building.

7 7. On November 14, 2012, the Trustee in the Fay Avenue
8 bankruptcy proceeding ("Trustee") filed a notice that he intended to
9 abandon all of the personal property in the building, with exception
10 of business records of the debtor either already in his possession
11 or still on the premises.

12 8. On November 30, 2012, Campbell requested that York be
13 permitted to enter the building to retrieve inventory in order to
14 fill holiday orders.

15 9. On December 4, 2012, Campbell and York removed the
16 inventory.

17 10. On December 8 or 9, 2012, by voice mail message, and on
18 December 10, 2012 by telephone, Campbell informed Mr. McIntyre for
19 the first time that the Court required LJ Spa (York) to provide
20 discovery in this action.

21 11. Mr. McIntyre immediately informed Campbell that he
22 (Campbell) was free to bring into the building a copy service to
23 copy whatever documents he wished. Campbell informed Mr. McIntyre
24 that York must have access to the building in order to identify the
25 documents. Mr. McIntyre would not allow York access into the
26 building (due to alleged vandalism believed to have been committed
27 by York and Judge Pressman's Order of November 7, 2012). Mr.
28 McIntyre informed Campbell that he could have immediate access to

1 the building to identify the relevant documents for copying, or in
2 the alternative, he could copy all the documents that remain in the
3 building.

4 12. On December 11, 2012, at an *ex parte* proceeding in the
5 San Diego Superior Court (Judge Pressman), Campbell raised the issue
6 of York's access to the building. Judge Pressman ordered that York
7 was not permitted to enter the building, but that Campbell and a
8 copy service may enter the building and copy whatever documents he
9 wished to copy.

10 13. From mid-October 2012 to December 10, 2012, Campbell did
11 not inform Mr. McIntyre that he or York needed access to the
12 documents in the building to fulfill discovery obligations in this
13 action.

14 On December 18, 2012, Travelers' counsel filed a Declaration
15 on behalf of Travelers. The Declaration states in pertinent part:

16 1. On December 11, 2012, Campbell sent him an email asking
17 for an extension of time to produce the documents requested by
18 Travelers.

19 2. Campbell indicated that he and York "were experiencing
20 difficulty in gaining access to the building so that (his client)
21 can respond further to the requests for documents and to the
22 interrogatories."

23 3. No further responses to Travelers' discovery requests were
24 served.

25 On December 21, 2012, the Court set an OSC hearing for LJ Spa
26 to explain why terminating sanctions should not be recommended
27 against it.

28

1 On January 10, 2013, Campbell filed an Opposition to the OSC.
2 The Opposition stated that it is essential that York examine the
3 books and records of LJ Spa (in the building) in order to respond to
4 Travelers' requested discovery because only she has the ability to
5 find the records that she needs to respond. Also, the Opposition
6 states that efforts to see the books and records (in the building)
7 have been made in good faith.

8 On January 11, 2013, Mr. McIntyre filed a Supplemental
9 Declaration. The Supplemental Declaration states in pertinent part:

10 1. York and Campbell would have this Court believe that
11 BioFilm, its counsel, and Judge Pressman somehow prevented LJ Spa
12 from complying with its discovery obligations in this case. The
13 impression they attempt to create is false.

14 2. On October 8, 2012, the Trustee filed a Motion For a Turn-
15 Over Order.

16 3. As soon as BioFilm learned that the Trustee sought a turn-
17 over order of Fay Avenue's documents, it informed Campbell by letter
18 of October 26, 2012, that without the Trustee's approval, BioFilm
19 would not allow anyone to remove documents from the building before
20 the November 29, 2012 hearing date on the Trustee's Motion.

21 4. After the October 26, 2012 letter, neither Campbell, York,
22 nor anyone else on behalf of LJ Spa asked for access to the
23 documents in the building in order to make copies, as opposed to
24 physically removing the documents, to comply with discovery
25 obligations in this case, or for any other reason.

26 5. On November 1, 2012, York, in the San Diego Superior Court
27 (Judge Pressman), sought an *ex parte* return of her personal property
28 in the building. BioFilm opposed York's application and sought a

1 restraining order to protect property in the building that may
2 belong to the Fay Avenue bankruptcy estate. On November 7, 2012,
3 Judge Pressman entered the restraining order sought by BioFilm.

4 6. At no time during the hearing before Judge Pressman did
5 York or Campbell inform Judge Pressman that LJ Spa needed to make
6 copies of documents in the building in order to comply with
7 discovery obligations in this Court.

8 7. On November 14, 2012, the Trustee filed a notice of
9 proposed abandonment of all the personal property in the building,
10 with the exception of Fay Avenue business and financial records that
11 the Trustee had in his possession or that were located in the
12 building. The notice advised that unless objection was made, the
13 property would be abandoned back to Fay Avenue on December 14, 2012.

14 8. As soon as BioFilm received the Trustee's notice of
15 proposed abandonment on November 14, 2012, it informed Campbell that
16 BioFilm would open the doors of the building on December 15, 17 and
17 18, 2012 for anyone claiming ownership of personal property in the
18 building to remove it.

19 9. On December 11, 2012, a hearing was held before Judge
20 Pressman. Campbell informed Judge Pressman that he would not be able
21 to identify any document that needed to be copied for production in
22 this case.

23 10. Judge Pressman informed Campbell to copy all of the
24 documents.

25 11. Immediately after the December 11, 2012 hearing, Mr.
26 McIntyre wrote to Campbell asking for information regarding when he
27 or his copy service wanted access to the building. Campbell did not
28 respond.

1 12. On December 12, 2012, Mr. McIntyre wrote to Campbell
2 asking him to identify the moving company York and her companies,
3 including LJ Spa, would be using on December 15, 17 and/or 18, 2012
4 to remove from the building her and her companies' personal
5 property. Campbell did not respond.

6 13. Other third parties, including two of Campbell's clients,
7 made arrangements to remove their property from the building.
8 BioFilm's counsel gave them access to do so.

9 14. At no time did Campbell, York, or anyone else on behalf
10 of York or LJ Spa seek access to copy, or after December 15, 2012 to
11 remove, any documents in the building.

12 15. All of LJ Spa's documents in the building were in a
13 single location, a second floor office suite. The documents in other
14 locations in the building had been moved to that office suite. There
15 was a copy machine in the office suite.

16 On January 17, 2013, the Court held an OSC hearing regarding
17 why terminating sanctions should not be recommended against LJ Spa.
18 At the hearing, Mr. McIntyre testified consistently with his two
19 Declarations. Ms. King testified that no one representing LJ Spa or
20 York contacted her or her law firm to gain access to the documents
21 in the Trustee's possession that may have been responsive to
22 Travelers' discovery requests. Moreover, Ms. King testified that
23 there was no legal impediment that would have prohibited her from
24 giving Campbell or York access to the documents in the Trustee's
25 possession. Had Campbell or York made a request for the documents,
26 the only challenge, according to Ms. King, would have been logisti-
27 cal and as to that, she confidently testified that suitable
28 arrangements could have been worked out.

II

ANALYSIS

Federal Rule of Civil Procedure 16(f) states in pertinent part:

On motion or on its own, the court may issue just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii) if a party...

(A) fails to appear at a ... pretrial conference;

...

(C) fails to obey a ... pretrial order.

Federal Rule of Civil Procedure 37(b)(2)(A) states in pertinent part:

... the court... may issue further just orders. They may include the following:

...

(v) dismissing the action or proceeding in whole or in part...

If a party fails to obey a court order, the court may sanction the disobedient party by striking pleadings, staying further proceedings pending compliance, or terminating the action by default or dismissal. USA ex. rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co., Inc., 857 F.2d 600 (9th Cir. 1988)(terminating sanctions upheld for, *inter alia*, failure to obey a court order to produce documents); Toth v. TWA, 862 F.2d 1381 (9th Cir. 1988). (terminating sanctions upheld for failure to obey a court order to provide discovery).

Dismissal as a sanction is authorized only in "extreme circumstances." Fjelstad v. American Honda Motor Co., Inc. 762 F.2d 1334, 1338 (9th Cir. 1985) (terminating sanctions upheld for failure to obey a court order to provide discovery), Wiltec Guam, *supra*, at 603. In order to warrant imposition of such a severe sanction, the

1 conduct of the disobedient party must be "due to wilfulness, bad
2 faith or fault." Wiltec Guam, supra, at 603.

3 The Ninth Circuit has identified five factors that a court
4 must consider before dismissing an action as a sanction:

- 5 (1) the public's interest in expeditious
resolution of litigation;
- 6 (2) the court's need to manage its docket;
- 7 (3) the risk of prejudice to the other party;
- 8 (4) the public policy favoring disposition of
cases on their merits; and
- (5) the availability of less drastic sanctions.

9 Leon v. IDX Systems, 464 F.3d 951 (9th Cir. 2006)(terminating
10 sanctions upheld for willful destruction of evidence); Adriana
11 International Corp. v. Thoren, 913 F.2d 1406, 1412 (9th Cir. 1990)
12 (terminating sanctions upheld for failure to obey court orders to
13 provide discovery and to appear for a deposition); Malone v. United
14 States Postal Service, 833 F.2d 128, 130 (9th Cir. 1987) cert. denied
15 488 U.S. 819 (1988)(terminating sanctions upheld for failure to obey
16 court order); Area 55, Inc. v. Celeras, 2011 WL 1375307 at *2 (S.D.
17 Cal. 2011) (terminating sanctions for failure to obey court order);
18 McReynolds v. Midland Credit Mgmt., 2011 WL 7477676 (S.D. Cal. 2011)
19 (terminating sanctions for failure to attend court-ordered hearing).

20 Where a court order is violated, the first two factors
21 support sanctions while the fourth factor argues against dismissal.
22 Adriana International, supra, at 1412; Ferdik v. Bonzelet, 963 F.2d
23 1258, 1261 (9th Cir. 1991) (terminating sanctions upheld for failure
24 to obey court order); McReynolds, supra at *2. The public's interest
25 in expeditious resolution of litigation always favors dismissal.
26 Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002) (terminating
27 sanctions upheld for failure to obey court order). Here, Plaintiff
28

1 has violated at least three court orders.^{3/} Therefore, the third and
2 fifth factors are determinative of the result.

3 As to the third factor, a party suffers prejudice if the
4 disobedient party's actions impair the opposing party's ability to
5 go to trial or threatens to interfere with the rightful decision of
6 the case. Malone, supra, at 131. Failure to obey a court order is
7 considered sufficient prejudice. Here, Plaintiff's failure to appear
8 at court-ordered hearings, failure to comply with court orders in
9 this case and most importantly, failure to provide discovery,
10 constitute an interference with the rightful decision of this case.
11 Consequently, Travelers has been prejudiced by LJ Spa's failures.
12 Malone, supra, at 131; Area 55, supra at *2; McReynolds, supra at
13 *2.

14 LJ Spa's claim that it could not provide its Initial
15 Disclosures and complete responses to Travelers' discovery requests
16 because it did not have access to the documents it needed in order
17 to provide such responses is false, disingenuous and belied by the
18 facts presented to this Court.

19 From the time Travelers served its discovery requests on LJ
20 Spa on July 12, 2012 to October 19, 2012, LJ Spa had unfettered
21 access to the documents it claims it needed to review to properly
22 respond. Neither LJ Spa nor York many any attempt to retrieve the
23 documents that were in their exclusive possession, review those
24 documents in a deliberative fashion, and respond to Travelers'
25 discovery requests in a timely manner. Once the Sheriff evicted York

27 ^{3/} These Orders are: (1) Failure to abide by the Court's May 21, 2012 Order
28 Setting Rule 26 Compliance; (2) Failure to abide by the Court's August 21, 2012
Order to meet and confer regarding its responses to Travelers' discovery requests;
(3) failure to abide by the Court's December 6, 2012 Order to serve responses to
Travelers' discovery requests.

1 and her companies from the building on October 19, 2012, the task of
2 responding to Travelers' discovery requests became more difficult,
3 but not impossible. Notwithstanding the earlier dereliction, with
4 the slightest bit of initiative and ingenuity, Campbell and York
5 could have met their discovery obligations simply by making a few
6 telephone calls to gain access to the documents. Instead, they did
7 absolutely nothing. Even when they were confronted with the spectre
8 of terminating sanctions after the December 6, 2012 hearing on
9 Traveler's Motion to Compel, they still did absolutely nothing.

10 Shortly after November 14, 2012, Campbell was informed that
11 the doors of the building where the documents were stored would be
12 open on December 15, 17 and 18, 2012 for anyone to remove personal
13 property. Neither Campbell, York, LJ Spa, nor anyone representing
14 them, examined or removed the documents on those dates.

15 On December 4, 2012, Campbell, York and LJ Spa were allowed
16 access to the building where the documents were stored to retrieve
17 some of LJ Spa's inventory. Neither Campbell, York, LJ Spa, nor
18 anyone representing them, reviewed the documents, nor removed them
19 at that time.

20 The fifth factor requires the court to consider the
21 availability of less drastic sanctions. The Ninth Circuit has
22 identified a three part analysis that courts must use to determine
23 whether the adequacy of less drastic sanctions has been properly
24 considered:

- 25 (1) Did the court explicitly discuss the feasibility
26 of less drastic sanctions and explain why
27 alternative sanctions would be inappropriate?
28 (2) Did the court implement alternative sanctions?
(3) Did the court warn the disobedient party of the
possibility of dismissal before actually
ordering dismissal?

1 Adriana International, supra, at 1412, Malone, supra, at 132;
2 McReynolds, supra at *2.

3 Here, it is evident that no less drastic sanction other than
4 dismissal is appropriate in this case. LJ Spa has already failed to
5 comply with court orders regarding court appearances and appears to
6 have abandoned any interest in prosecuting this litigation by
7 failing, on numerous occasions, to either copy the documents in the
8 building or remove them, so it could comply with its discovery
9 obligations and court orders in this case. Moreover, the Court
10 warned LJ Spa that its failure to appear at court ordered hearings
11 and its failure to abide by the Court's Local Rules and its
12 discovery obligations in this case may subject its case to dis-
13 missal. "A court's warning to a party that failure to obey the
14 Court's order will result in dismissal satisfies the 'consideration
15 of (less drastic) alternative (sanctions).'" Lance v. Adams, 2011 WL
16 2312171 at *2 (E.D. Cal. 2011), quoting Ferdik, supra, at 1262, and
17 Malone, supra, at 132-133. Therefore, every justification exists
18 and all criteria necessary to impose the ultimate sanction of
19 dismissal have been met.

20 LJ Spa's disobedience to orders of this Court and its failure
21 to comply with its discovery obligations in this case, as detailed
22 above, leave the Court with no alternative but to RECOMMEND that the
23 District Court DISMISS LJ Spa's case in its entirety, with preju-
24 dice.

25 CONCLUSION AND RECOMMENDATION

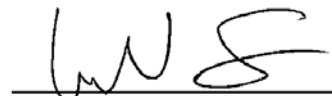
26 After a review of the record in this matter, the undersigned
27 Magistrate Judge RECOMMENDS that the District Court DISMISS LJ Spa's
28 case in its entirety, with prejudice.

1 This Report and Recommendation of the undersigned Magistrate
2 Judge is submitted to the United States District Judge assigned to
3 this case, pursuant to the provision of 28 U.S.C. § 636(b)(1).

4 **IT IS ORDERED** that no later than February 19, 2013 any party
5 to this action may file written objections with the Court and serve
6 a copy on all parties. The document should be captioned "Objections
7 to Report and Recommendation."

8 **IT IS FURTHER ORDERED** that any reply to the objections shall
9 be filed with the Court and served on all parties no later than
10 March 4, 2013. The parties are advised that failure to file
11 objections within the specified time may waive the right to raise
12 those objections on appeal of the Court's order. Martinez v. Ylst,
13 951 F.2d 1153 (9th Cir. 1991).

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18 DATED: January 28, 2013
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21 Hon. William V. Gallo
22 U.S. Magistrate Judge
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